87-1307

Supreme Court, U.S.
FILED
JAN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States
October Term, 1987

Salvador W. Porto,
Petitioner,

vs.

Armco, Inc.; Mellon Bank, N.A., Trustee;
Armco, Inc. Benefit Plans Administrative
Committee
Respondents

On Writ of Certiorari from the
United States Court of Appeals, Eighth
Circuit
Case No. 86-250-WM

PETITION FOR WRIT OF CERTIORARI

Michael W. Manners
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Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

5

QUESTION PRESENTED

May an employee retirement plan administrator disclose plan modifications to select groups of plan participants, excluding other factions of participants, without violating the fiduciary requirements set forth in 29 U.S.C. 1104 - provided all plan participants receive notification of the modifications within the time period prescribed by 29 U.S.C. 1024 (b)(1)(B)?

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PREVIOUS JUDICIAL HOLDINGS

The Honorable John W. Oliver of the Western District Court of the State of Missouri entered judgment for Defendants on October 20, 1986 and signed a Memorandum and Order granting summary judgment to defendants, Armco, Inc. Plaintiff's motion to amend said order was denied on November 20, 1986 by the Honorable Judge Oliver. Said orders with accompanying judicial comments are appended.

Plaintiff appealed his case to the United States Court of Appeals for the Eighth Circuit. The lower court's decision was upheld in an opinion filed August 10, 1987 and appended hereto. Subsequent motion for rehearing was denied on October 12, 1987.

JURISDICTION

This action falls under the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 et seq. This petition for writ of certiorari is filed in conjunction with the August 10, 1987 decision of the United States Court of Appeals for the Eighth Circuit. Said decision was followed by a motion for rehearing which was denied on October 12, 1987 as evidenced by the appended order. This petition is timely filed within ninety (90) days of the October 12, 1987 order.

Jurisdiction is bestowed on this court under Supreme Court Rule 17.1 in that a lower federal court has decided an important question of federal law which should be settled by this court.

CITATION OF APPLICABLE FEDERAL STATUTES

The purpose of the Employee Retirement Income Security Act (ERISA) is set forth in 29 U.S.C. 1001, and most specifically subsection (b), which states:

> It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing appropriate remedies, sanctions, and ready access to the Federal courts.

The fiduciary duties of a plan administrator are set forth in 29 U.S.C. 1104:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

The time requirements imposed upon a plan administrator for furnishing information to participants regarding new provisions is set forth in 29 U.S.C. 1024 (b)(1)(B), which states in part:

If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

STATEMENT OF THE CASE

This is an action under the Employee Retirement Income Security Act (ERISA) 29 U.S.C. 1001 et seq., in which petitioner alleged a breach of fiduciary duty as described in 29 U.S.C. 1104(A) by the administrator of petitioner's retirement thrift plan. The breach occurred when the plan administrator notified all actively employed plan participants of a plan modification which permitted revocation of previously irrevocable retirement investment elections. Said written notification of the plan modification was mailed to all actively employed plan participants on February 1, 1982. Retired plan participants did not receive the February 1 notice.

Petitioner retired from Armco, Inc. on

January 31, 1981, following 39 years of active service. Upon retirement he made what was then an irrevocable retirement investment in Armco stock. As the stock began to plummet, petitioner asked the plan administrator if the election could be changed. The request was denied in a letter written to petitioner on August 19, 1981.

The plan modification, effective January 1, 1982, permitted retired participants to revoke previously irrevocable elections. However, petitioner, among other retirees, did not receive the written notification mailed only to actively employed plan participants. Petitioner first learned of the modification during an informal conversation with the Plan Administrator in October 1982. He subsequently

received written notification in March 1983 when he received a new Summary Plan Description containing the modification. (Defendant claims Petitioner received constructive notice of the modification in April 1982 by way of a "Prospectus" which mentioned the modification. However, petitioner denies receiving a prospectus and there is no evidence the prospectus was mailed to retired participants.)

Between the time actively employed participants were notified of the plan modification and the time petitioner happened to learn of the modification, petitioner's investment had decreased in value approximately $40,000.00. Petitioner therefore brought suit against the plan administrators for damages resulting from disparate

disclosure of plan modifications, alleging breach of fiduciary duties set forth under 29 U.S.C. 1024 (b)(1).

The October 20, 1986 Memorandum and Order prepared by Honorable John W. Oliver of the U.S. District Court, Western Division, of the Western District of Missouri granted Defendant's motion for summary judgment. The memorandum holds as long as Petitioner received notice within 210 days following the year in which the change was adopted, as set forth in 29 U.S.C. 1024(b)(1), there could have been no breach of fiduciary duty. The order states on page 4:

> Neither the statute nor the regulations impose a requirement that all participants receive exactly the same form of notice at exactly the same time. It is sufficient that participants are adequately informed before the disclosure deadline. Neither does this disparate treatment constitute a

> violation of the administrator's general fiduciary duty imposed by 29 U.S.C. 1104. It was not imprudent for administrators to provide different types of notice to active and retired employees according to their respective needs, as long as all participants were timely notified.

Petitioner maintains the lower court erred in interpreting the fiduciary duties of plan administrators under ERISA. Plaintiff's motion to amend said judgment was denied on November 25, 1986. Appeal was filed with the U.S. Court of Appeals for the Eighth Circuit. The subsequent opinion filed August 10, 1987 affirmed the lower court's decision and in concluding stated:

> The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. Common law trust principles provide the foundation for the statutory standard, which prohibits the use of plan assets for the primary benefit of a party other than the plan itself.
>
> A plan administrator's duty to disclose information to plan

> participants is another matter, dealt with separately by ERISA. Although it can be argued that the local plan administrator should have informed the retired participants of the amendment when the active employees were so informed, we conclude that the district court did not err in holding that an administrator who complies with the statutory standard for disclosure cannot be said to have breached the fiduciary duty by not providing earlier disclosure.

Subsequent petition for rehearing was denied on October 12, 1987. Wherefore, Petitioner now asks this court to grant a Writ of Certiorari.

PRESENTATION OF ARGUMENT

Petitioner seeks a Writ of Certiorari under the authority of Supreme Court Rule 17.1 for the reasons that:

A federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The fact

situation presented is one of first impression which has not previously been entertained by a federal court and is appropriate for consideration by this Court to insure uniformity in future such fact situations and provide guidance for retirement plan administrators.

A federal court of appeals has decided an important question of federal law in a way that conflicts with prior holdings of other federal courts under different factual circumstances. An Ohio district court examined standards of fiduciary duty relating to the favoring of plan participants over plan beneficiaries in implementing plan revisions. The court stated, "the fiduciary is forbidden from granting preference as between a plan's participants or as between a plan's

beneficiaries. Bearing in mind that a fiduciary in discharging his duties must not grant preferences, this court will next examine the conduct of plaintiff-trustees" Winpisinger, et al. vs. Aurora Corporation of Illinois, Precision Castings Division, 456 F. Supp. 559, 566 (N.D. Ohio E.D. 1978).

The present holding conflicts with the attitude taken in the Winpisinger holding. The Missouri District Court, affirmed by the Court of Appeals, stated: "Neither the statute nor the regulations impose a requirement that all participants receive exactly the same form of notice at exactly the same time...Neither does this disparate treatment constitute a violation of the administrator's general fiduciary duty imposed by 29 U.S.C. 1104." Is one to

believe that disparate treatment of plan participants and beneficiaries is condoned by the federal courts in matters of disclosure?

Standards of judicial review for fiduciary obligations are set forth in Talarico v. United Furniture Workers Pension Fund A, 479 F. Supp. 1072, 1080 (D. Neb. 1979). Although the case does not pertain to "disclosure" activity, neither does it cite an exception for reviewing disparate fiduciary disclosures.

The current holding of the eighth circuit opens the door for retirement plan administrators to favor small groups of participants, and individuals, by providing advantageous investment information at the earliest opportunity. In the instant case, one group of

participants was informed of a January 1 modification just thirty days later. Under the current holding, the remaining participants could have been kept in the dark for one year and 210 days following the modification.

Granting this writ is essential to avoid future conflicting holdings, and provide clear cut guidelines for the courts and plan administrators.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

SALVADOR W. PORTO,	)	
	)	
Plaintiff,	)	Docket No.
	)	85-0406-CV-W-1
	)	
vs.	)	Federal Judge
	)	or U.S.
ARMCO, INC., et al.,	)	Magistrate
	)	John W. Oliver
	)	
Defendants.	)	

___ **Jury Verdict.** This action came before the Court and a jury with the above named judge (magistrate) presiding. The issues have been duly tried and the jury has duly rendered its verdict.

xxx **Decision by Court.** This action came on consideration before the Court with the above listed judge (magistrate)

presiding. The issues have been duly tried (heard) and a decision has been duly rendered.

IT IS ORDERED AND ADJUDGED,

Plaintiff has failed to demonstrate that defendants violated any of their ERISA duties. Thus, his motion for summary judgment must be denied and judgment entered for defendants.

In addition, defendant Armco cannot be held liable under ERISA for breach of fiduciary duty. As the employer and thrift plan sponsor, Armco's duty was limited to the selection of a proper plan administrator. There is no allegation herein that Armco was negligent in that selection.

Accordingly, it is

ORDERED (1) that plaintiff's motion for summary judgment should be and is

hereby denied. It is further

ORDERED (2) that defendants' motion for summary judgment should be and is hereby granted.

Entered on October 21, 1986.

A True Copy

TEST:

R.F. Connor, Clerk October 20, 1986

By: /s/ (Illegible)

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

SALVADOR W. PORTO,	)	
	)	
Plaintiff,	)	No. 85-0406-CV-W-1
	)	
vs.	)	
	)	
ARMCO, INC., et al.,	)	
	)	
Defendants.	)	

ORDER

On October 20, 1986, this Court ordered entry of judgment in this case for defendants after granting their motion for summary judgment. The case now pends on plaintiff's motion to amend judgment. For the reasons stated, plaintiff's motion will be denied.

In his suggestions in support of his motion, plaintiff directs this Court's attention to two district court cases from Ohio and Nebraska. Those cases,

however, are inapposite.

Talarico v. United Furniture Workers Pension Fund A, 479 F.Supp. 1072 (D. Neb. 1979), involved a situation in which employer contributions to a pension fund were being refused by the Fund because those contributions did not cover all employees. After defining the fund trustees' fiduciary duty under ERISA, and noting the Court's limited role in reviewing an exercise of discretion by the trustees, the Court concluded that the trustees had acted reasonably. Id. at 1081. In Winspisinger v. Aurora Corp., 456 F. Supp. 559 (N.D. Ohio 1978), the Court's discussion of the ERISA fiduciary duty arose out of its evaluation of trustees' retroactive cancellation of the past service credit of special class

employees. Id. at 566-567. Though both cases define the fiduciary duty created by ERISA, neither lends any authority to the proposition that that duty is breached when, as here, timely notice is provided to all participants in a plan, albeit by varying means. Indeed, neither case involved issues of disclosure at all.

Plaintiff has again failed to demonstrate that defendants breached any duty owed him under ERISA or that they acted imprudently. Defendants' timely disclosure of the plan amendment to plaintiff fulfilled their statutory and regulatory obligations. Thus, plaintiff's motion to amend judgment must be denied.

Accordingly, it is

ORDERED that plaintiff's motion to

amend judgment should be and is hereby denied.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri

November 25, 1986

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

SALVADOR W. PORTO,	)	
	)	
Plaintiff,	)	No. 85-0406-CV-W-1
	)	
vs.	)	
	)	
ARMCO, INC., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDERS

This action, brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. Section 1001 et seq. (ERISA), pends on cross-motions for summary judgment on the issue of liability. For the reasons stated, defendants' motion for summary judgment will be granted and plaintiff's motion will be denied.

The parties have entered into a full stipulation of facts and have agreed that no additional evidence is necessary for the decision of the liability issue.

(See Joint Stipulation of Facts, Item (3)). The material facts may be summarized as follows. Plaintiff served as an employee of defendant Armco for 39 years. From 1964 onward, plaintiff participated in the Armco "Thrift Plan for Salaried Employees," a profit sharing plan subject to the provision of ERISA. On September 30, 1980, just prior to his retirement effective January 31, 1981, plaintiff elected to withdraw his basic and supplemental contributions to the plan, and defer distribution of Armco contributions in his account and earnings thereon for five years. At the time plaintiff made that election, plan regulations provided that it was irrevocable.

On June 26, 1981, plaintiff wrote a letter to plan administrators requesting

that his plan account be liquidated and all proceeds remitted to him. (See Exhibit A attached to Defendants' Motion for Summary Judgment on Liability and Suggestions in Support Thereof). Plaintiff received a reply to his request informing him that his irrevocable election to defer distribution for five years precluded present liquidation of his account.

In January 1982, due to changes in the tax code, the thrift plan was amended to permit participants to revoke previously irrevocable elections made upon retirement. Although defendant Armco asserts that on or about April 29, 1982 a plan prospectus was mailed to all active and retired plan participants, plaintiff claims that he did not learn of the amendment allowing him to revoke

his retirement election until he spoke with a local plan administrator in October 1982. (See Joint Stipulation of Facts Nos. 31 and 33). Plaintiff also received a 1982 Summary Plan Description, which clearly set forth the election modification, as an enclosure with a letter from the Insurance and Benefits Program Supervisor dated March 3, 1983. (See Joint Stipulation of Facts Nos. 37-38).

Plaintiff contends that defendants failed to provide him with notice of the amendment in time to allow him to withdraw remaining funds before his account diminished in value, and that they thereby breached their fiduciary duties. We disagree.

When it enacted ERISA, Congress created duties of disclosure and

reporting which must be met by administrators of plans covered thereunder. Section 1024(b)(1) requires plan administrators to furnish summary descriptions of modifications and changes in the plan not later than 210 days after the end of the plan year in which the change is adopted.

Here, the modification allowing revocation of retirement elections was adopted on January 1, 1982. Thus, the ERISA deadline by which the modification had to be disclosed was July 29, 1983. Plaintiff admits that he learned he could withdraw the funds in his account during a conversation with a plan administrator in October 1982. (See Joint Stipulation of Facts No. 33). In March 1983, plaintiff received a copy of the 1982 Summary Plan Description which

clearly explained the modification rendering elections revocable. (See Joint Stipulation of Facts No. 38). The provision of a summary plan description which incorporates material modifications is an acceptable method of disclosure. See 29 C.F.R. 2520.104b-3(b) (1985). Thus, plaintiff received notice that was both timely and adequate under the statute and applicable regulations. Indeed, by his own admission, plaintiff had actual knowledge of the modification even before the end of the year in which it was adopted.

Plaintiff argues, however, that defendants somehow breached their duties by failing to provide notice at the same time and in the same manner to retired employees as they did to active

employees. Active employees received a letter on February 1, 1982 outlining changes in the plan, among which was the new revocability of retirement elections.

Neither the statute nor the regulations impose a requirement that all participants receive exactly the same form of notice at exactly the same time. It is sufficient that participants are adequately informed before the disclosure deadline. Neither does this disparate treatment constitute a violation of the administrators' general fiduciary duty imposed by 29 U.S.C. Section 1104. It was not imprudent for administrators to provide different types of notice to active and retired employees according to their respective needs, as long as all

participants were timely notified.

Plaintiff also contends that defendants breached their fiduciary duties because, although plaintiff's letter put them on notice of his desire to liquidate his account, they failed to immediately notify him of the modification permitting such liquidation. Thus, he argues, they are liable for damages modeled after those provided for by 29 U.S.C. Section 1132(c). That section imposes personal liability on plan administrators for refusing to supply requested information which they are under a duty to disclose within 30 days of the request. Plaintiff attempts to characterize his June 26, 1981 letter as a notice to the administrators of his interest in any modification that would allow him to

liquidate his account, and argues that plan administrators therefore had a duty to immediately notify him of the January 1982 modification.

Acceptance of plaintiff's argument would impermissibly extend the scope of the duties imposed by ERISA. Even if plaintiff's June 26, 1981 letter, which was essentially an order to liquidate rather than a request for information, can be construed to have put defendants on notice, they did not violate their fiduciary duties to plaintiff. Because this modification had not yet been adopted at the time they received plaintiff's letter, defendants lacked the authority to liquidate his account, and they properly so informed him. Further, defendants' earlier receipt of the letter did not impose on them a

special duty to immediately notify plaintiff of modifications to the plan. Defendants' fiduciary duty does not extend so far as to require individualized notice of an event on the basis of requests made over six months before it occurred. Moreover, to read such a duty into ERISA would unreasonably burden plan administrators.

Although this case appears to present unique factual circumstances, other cases decided under ERISA support the principle that the statutory fiduciary and disclosure duties do not encompass individualized attention for particular employees. See, e.g., Shlomchik v. Retirement Plan of Amalgamated Insurance Fund, 502 F. Supp. 240, 245 (E.D. Pa. 1980), aff'd, 671 F.2d 496 (3d Cir. 1981) (failure to individually alert

past participants of pension plan requirement not a violation of ERISA fiduciary duty); Allen v. Atlantic Richfield Retirement Plan, 480 F. Supp. 848, 851 (E.D. Pa. 1979), aff'd, 633 F.2d 209 (3d Cir. 1980) (no duty to inform individual about advantages of a particular election under a plan); see also Sleichter v. Monsanto Co., 612 F. Supp. 856, 859 (E.D. Mo. 1985) (no duty to disclose possibility of adoption of new benefits even though participant made inquiry); Sutton v. Weirton Steel Division of National Steel Corp., 567 F. Supp. 1184, 1196 (N.D. W. Va. 1983), aff'd, 724 F.2d 406 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984) (no duty to disclose amendments before they are affected).

The plaintiff has failed to demonstrate that defendants violated any of their ERISA duties. Thus, his motion for summary judgment must be denied and judgment entered for defendants.

In addition, defendant Armco cannot be held liable under ERISA for breach of fiduciary duty. As the employer and thrift plan sponsor, Armco's duty was limited to the selection of a proper plan administrator. There is no allegation herein that Armco was negligent in that selection. See Gelardi v. Pertec Computer Corp., 761 F.2d 1323, 1325 (9th Cir. 1985).

Accordingly, it is

ORDERED (1) that plaintiff's motion for summary judgment should be and is hereby denied. It is further

ORDERED (2) that defendants' motion for summary judgment should be and is hereby granted. It is further

ORDERED (3) that the Clerk is directed, pursuant to Rule 58 of the Federal Rules of Civil Procedure, to enter final judgment on a separate document against the plaintiff and for defendant Armco, Inc. and for defendant Armco, Inc. Benefit Plans Administrative Committee.

/s/ John W. Oliver
John W. Oliver
Senior Judge

Kansas City, Missouri

October 20, 1986

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2500

Salvadore W. Porto,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal from the
	)	United States
Armco, Inc.;	)	District Court
Mellon Bank,	)	for the Western
N.A., Trustee; Armco,	)	District of
Inc. Benefit Plans	)	Missouri
Administrative	)	
Committee,	)	
	)	
Appellees.	)	

Submitted: July 6, 1987

Filed: August 10, 1987

Before McMILLIAN, JOHN R. GIBSON, and WOLLMAN, Circuit Judges.

PER CURIAM.

Salvador Porto, a retired Armco, Inc. employee, appeals from the district court's[1] order granting Armco, Inc. Benefit Plans Administrative Committee (Administrator) summary judgment on Porto's claim under the Employee Retirement Income Security act, 29 U.S.C. Sections 1001, et seq. (ERISA). For reversal, Porto argues that the district court erred in concluding that the Administrator did not breach its fiduciary duty by failing to inform Porto and other retired plan participants of a modification to plan regulations when active employees were so informed. We affirm.

I. BACKGROUND

Porto retired from Armco, Inc.

---

[1]The Honorable John W. Oliver, United States District Judge for the Western District of Missouri.

effective January 31, 1981, after 39 years of employment. He was a participant in the company's ERISA-covered profit sharing plan, which provided for employee contributions and 50% matching contributions from Armco, which had to be used to purchase Armco common stock. Upon his retirement Porto elected to receive from his plan account his own contributions and to defer for five years distribution of Armco's contributions and earnings thereon. Porto knew that the decision to defer this distribution was irrevocable under the then applicable plan regulations.

On June 26, 1981, Porto wrote to the Administrator that because of changed family circumstances he was requesting distribution of his remaining account, i.e., that his Armco stock be sold and

that he be sent its cash value plus earnings. By letter dated August 19, 1981, the Administrator told Porto that the plan regulations did not permit such a change in his retirement election. During this time, the value of Armco common stock was steadily falling.

In January 1982, prompted by a change in the Internal Revenue Code, the plan adopted an amendment to its regulations to permit the once irrevocable decision on withdrawal choices upon retirement to be revocable. Porto's local plan administrator, appointed by the Administrator, sent a letter to all local employed plan participants on or about February 1, 1982, advising them of this amendment. The letter was not sent to the local retired participants such as Porto. Porto did not learn of the

revocability amendment until he spoke with the local plan administrator on October 1, 1982. In March 1983 Port received a plan description which set forth the revocability amendment.

When Porto learned of the amendment on October 1, 1982, he did not ask for immediate distribution of this account. Rather, on October 7, 1982, he requested a partial, and on July 6, 1983, a full transfer from the Armco Common Stock Fund to the Diversified Stock Fund. Finally, on April 2, 1985, Porto authorized the withdrawal and cash distribution of his entire remaining account.

In his complaint, Porto claimed that the Administrator and Armco breached their ERISA-imposed fiduciary duties by their failure to inform the retire plan

participants of the revocability amendment when the active participants were so informed. He sought as damages the difference in the value of his Armco common stock on the date he claims he should have been informed and on October 1, 1982, the date he actually was informed. The issue of liability was submitted to the district court on cross-motions for summary judgment, on stipulated facts and other designated evidentiary material.

In granting Armco and the Administrator summary judgment, the district court noted that Porto was notified of the amendment within the time limit provided for in ERISA, 29 U.S.C. Section 1024(b)(1),[2] for disclosure of modifications in a plan. The district court held that Armco and the Administrator did not have an obligation to notify retired employees at the same time and in the same manner as active employees so long as

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[2] 29 U.S.C. Section 1024(b)(1)(B) provides as follows:

> If there is a [material] modification or change in the terms of the [plan] . . . , a summary judgment description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

notification to all participants was timely under the statute. The district court also concluded that Porto's June 26, 1981, letter did not trigger 29 U.S.C. Section 1132(c), which imposes liability upon plan administrators for refusing to supply requested information within 30 days of the request. Finally, the district court held that Porto's June 1981 letter did not impose upon Armco and the Administrator a special individualized duty toward Porto.

Porto appeals only from the judgment in favor of the Administrator, and he challenges only the district court's conclusion that the Administrator's compliance with ERISA's disclosure provision precludes a breach-of-fiduciary-duty claim.

II. ANALYSIS

ERISA, 29 U.S.C. Section 1104(a), imposes a prudent person standard of care upon plan fiduciaries:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) either the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

The district court did not make a finding that the Administrator had acted in a reasonable manner. Rather, the court in effect concluded that, as a

matter of law, a breach-of-fiduciary-duty claim cannot be based on a failure to disclose when the statutory disclosure requirements have been met.

The fiduciary duty imposed by ERISA is generally applied to the management of plan assets. Common law trust principles provide the foundation for the statutory standard, which prohibits the use of plan assets for the primary benefit of a party other than the plan itself.

A plan administrator's duty to disclose information to plan participants is another matter dealt with separately by ERISA. Although it can be argued that the local plan administrator should have informed the retired participants of the amendment when the active employees were so

informed, we conclude that the district court did not err in holding that an administrator who complies with the statutory standard for disclosure cannot be said to have breached the fiduciary duty by not providing earlier disclosure.

III. CONCLUSION

The district court's order is affirmed.[3]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[TO BE PUBLISHED]

---

[3]We have considered, and hereby deny, appellee's motion to dismiss the appeal for want of a proper notice of appeal.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2500

Salvadore W. Porto,	)	
	)	
Appellant,	)	
	)	
v.	)	Appeal from the
	)	United States
Armco, Inc.; Mellon	)	District Court
Bank, N.A., Trustee;	)	for the Western
et al.,	)	District of
	)	Missouri
	)	
Appellees.	)	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 12, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals,
Eighth Circuit

87-1307 (2)

No.

Supreme Court, U.S.
FILED
FEB 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SALVADOR W. PORTO,
Petitioner,

vs.

ARMCO INC. and ARMCO INC. BENEFIT PLANS ADMINISTRATIVE COMMITTEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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2/88

QUESTION PRESENTED FOR REVIEW

Whether the Employee Retirement Income Security Act (ERISA) and its implementing regulations impose a requirement that all plan participants receive exactly the same form of notice of material modifications to a plan at exactly the same time so long as the plan participants receive timely notification of the modification within the period set by ERISA?

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

SALVADOR W. PORTO,
Petitioner,

vs.

ARMCO INC. and ARMCO INC. BENEFIT PLANS ADMINISTRATIVE COMMITTEE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Armco Inc. [Armco][1] and Armco Inc. Benefit Plans Administrative Committee [BPAC] respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion in this case by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 825 F.2d 1274 (8th Cir. 1987). The other opinions are listed in petitioner's appendix.

1. The listing of Armco Inc.'s parent companies, subsidiaries and affiliates as required by Supreme Court Rule 28.1 appears in the Appendix at page A1.

JURISDICTION

This action was removed to the United States District Court for the Western District of Missouri, Western Division, from the Circuit Court of Jackson County, Missouri, pursuant to 28 U.S.C. § 1441, in that the civil action was one in which the federal district court had original jurisdiction pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeded the sum or value of $10,000 and was between citizens of different states and pursuant to 28 U.S.C. § 1331 because the matter arose under the laws of the United States.

On petitioner's appeal, the clerk for the United States Court of Appeals for the Eighth Circuit entered an order on August 10, 1987 affirming the district court's order granting summary judgment to defendants. Petitioner moved for an en banc rehearing which was denied on October 12, 1987.

Petitioner asserts that the jurisdiction of this Court rests upon Supreme Court Rule 17.1 in that a lower federal court has decided an important question of federal law which should be settled by this Court. Petitioner apparently attempts to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 1024(b)(1)

29 U.S.C. § 1104(a)(1)(A) and (B)

29 C.F.R. § 2520.104b-1(b) (1987)

29 C.F.R. § 2520.104b-3(b) (1987)

These statutes and regulations are set forth fully in the Appendix at pp. A4-A7.

STATEMENT OF THE CASE

The sole issue raised by petitioner in this case is whether a plan administrator of an employee welfare benefit plan must ensure that all plan participants receive notification of modifications to the plan at exactly the same time even though the participants are timely notified pursuant to ERISA.

On January 31, 1981 petitioner retired from Armco Inc.'s [Armco] Kansas City facility. During his employment, petitioner had been a participant in the Armco Inc. Thrift Plan [Thrift Plan]. Armco was the plan sponsor; Armco Inc. Benefit Plans Administrative Committee [BPAC] was the named Thrift Plan administrator; and Mellon Bank, N.A. (an unserved defendant) was the Thrift Plan trustee. The Thrift Plan at issue in this case is a nation-wide thrift plan which, on December 31, 1981, had 12,290 participants scattered across the United States.

When he retired in 1981, petitioner made what was then an irrevocable decision to defer receipt of a portion of the funds held for his benefit in the Thrift Plan. In January 1982 the Thrift Plan adopted an amendment to permit petitioner's once irrevocable decision to defer distribution upon retirement to become revocable because of a change in the federal tax law.

The local plan administrator at the Kansas City, Missouri plant, appointed by BPAC, sent a letter to all *local* employed plan participants on or about February 1, 1982 advising them of several changes in the Thrift Plan affecting active employees only including the change that an active employee who retired after January 1, 1982

could later change his or her decision on distribution of Thrift Plan amounts after retirement. The letter was not sent to the local retired participants in the Kansas City area such as petitioner.

The parties stipulated[2] Armco would testify that on or about April 29, 1982 a plan prospectus was mailed to *all* plan participants across the nation, active *and retired,* by first-class, postage prepaid, mail. The parties also stipulated that while petitioner claimed he did not receive this plan prospectus Armco had no record that any plan prospectus addressed to petitioner was returned to Armco. Petitioner testified in his deposition that had he received and read the April 1982 prospectus he would have been notified of this modification.

It is undisputed that petitioner received actual notification of the modification in October 1982 when he met with the local administrator who informed petitioner that his previous decision to delay distribution of the remaining amounts was no longer irrevocable. However, petitioner still continued to leave his funds within the Thrift Plan.

Petitioner admitted that he again had notice in March 1983 when he received a summary plan description clearly setting forth the modification. However, petitioner further waited until April 1985 to liquidate his account—almost two and one-half years after he admitted that he received actual notice in October 1982. During that time he bypassed opportunities to recoup his losses and waited to liquidate his account until a time that his stock was less than half of the value it was in October 1982.

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2. This action was tried to the United States District Court for the Western District of Missouri, Western Division on cross motions for summary judgment on liability only and upon stipulated facts, deposition testimony and other designated evidence.

The district court held that Armco could not be held liable for any alleged breach of fiduciary duty as its duty was limited to the selection of a proper plan administrator and there was no allegation that Armco was negligent in that selection. The district court further held that there had been no breach of duty by BPAC, fiduciary or otherwise, since petitioner had received timely notification under ERISA and even though petitioner did not receive notice of the modification at the same time that active employees at the Kansas City plant received notice. Petitioner appealed to the Eighth Circuit only from the judgment in favor of the plan administrator.

ARGUMENT

Petitioner has advanced two reasons for granting his petition under Supreme Court Rule 17.1. Neither reason is substantiated by his argument and neither is sufficient for this Court to grant his petition.

The Decision of the Eighth Circuit Does Not Involve an Important Question of Federal Law Which Was Incorrectly Decided

Petitioner urges this Court to grant his petition on the ground that the Eighth Circuit has decided an important question of federal law which has not been but should be settled by this Court. This is not an important question which needs this Court's decision because ERISA clearly sets forth the time limits within which a plan administrator has to disclose a material modification of an employee benefit plan.

29 U.S.C. § 1024(b)(1) imposes upon plan administrators a duty to furnish a summary description of a

material modification not later than 210 days after the end of the plan year in which the change is adopted (July 29, 1983 in this instance). Petitioner received notification of the modification substantially before that deadline elapsed—twice by his own testimony.[3]

The statute clearly sets forth the notification guidelines. There is no question that petitioner received sufficient and timely notice.

Petitioner argues, however, that BPAC breached some alleged fiduciary duty[4] to petitioner because he did not receive notice that his previous decision to defer distribution of his Thrift Fund assets was no longer irrevocable at the same time the local plan administrator gave notice to actively employed Kansas City Thrift Plan participants that their *future* decisions made upon their retirement about distribution of Thrift Plan funds would not be irrevocable.

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3. Petitioner admitted he received actual notice that he could liquidate his Thrift Plan account in October 1982 from the local plan administrator and again when he received a copy of a summary plan description in March 1983 clearly setting forth the modification. 29 C.F.R. § 2520.104b-3(b) (1987) (summary plan description incorporating material modification is an acceptable method of disclosure). While petitioner denied receiving the April 1982 prospectus, which he admitted would have notified him of the modification, actual receipt of the notice was not required since the prospectus was sent to all participants, active and retired, by first class mailing. 29 C.F.R. § 2520.104b-1(b); *Vaughan v. Metal Lathers Local 46 Pension Fund*, 474 F. Supp. 613, 620 (S.D. N.Y. 1979), *aff'd*, 626 F.2d 237 (2nd Cir. 1980).

4. Plaintiff characterizes the plan administrator's duty as a fiduciary duty. The duty to notify of a material modification is contained in Part I of ERISA and not in Part IV of ERISA which deals with fiduciary duties. See discussion and dictum in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) distinguishing between duties of an administrator found in Part IV and Part V.

The Thrift Plan had over 12,000 participants (both employed and retired) at the time the modification was adopted who were scattered across the nation. The district court found that neither the statute nor the regulations imposed a requirement that all participants receive exactly the same form of notice at exactly the same time nor was it a breach of fiduciary duty under 29 U.S.C. § 1104 for administrators to provide different types of notice to active and retired employees so long as all participants were timely notified.

Petitioner wants this Court to change ERISA's 210-day notification provision by imposing a fiduciary duty upon plan administrators to ensure that every participant receives notice of a material modification at exactly the same time. This would impose an impossible burden on plan administrators who must deal with widely scattered and different types of participants. It could impose fiduciary liability on plan administrators where participants were inadvertently not notified or notified in a manner differently than others. Congress surely did not intend the imposition of such liability and thus specifically set forth the standards governing disclosure.

The Eighth Circuit Decision Does Not Conflict With Decisions of Any Other Federal Appellate Court

Petitioner contends in his argument the Eighth Circuit has decided an important question of federal law which conflicts with prior holdings of other lower federal courts. Not only is this an inaccurate statement since petitioner himself argues this is a case of first impression, but also the purported conflict with *lower* federal court decisions is not sufficient reason to grant his petition.

Rule 17.1(a) indicates a petition for certiorari may be considered when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of *appeals* on the same matter. The petitioner requests this Court grant his petition because he claims that the Eighth Circuit's decision conflicts with decisions of two federal *district* courts.

Petitioner cites the Court to *Winpisinger v. Aurora Corp. of Illinois, Precision Castings Division*, 456 F. Supp. 559 (N.D. Ohio E.D. 1978), and *Talarico v. United Furniture Workers Pension Fund A*, 479 F. Supp. 1072, 1080 (D. Neb. 1979). Neither of these cases deals with the issue at hand, much less being conflicting decisions of another court of appeals. In *Winpisinger*, as the district court noted, the discussion of the ERISA fiduciary duty arose out of evaluation of the trustees' retroactive cancellation of the past service credit of a special class of employees. *Talarico* involved a situation in which the employer contributions to a pension fund were being refused by the fund because those contributions did not cover all employees. Neither case lends any authority to the proposition that a fiduciary duty is breached if timely notice is provided to all participants in a plan even though by varying means and at varying times. Neither case involves issues of disclosure of material modifications whatsoever. Neither case is an appellate court decision in direct conflict with the Eighth Circuit's holding in this case.

CONCLUSION

Petitioner's argument for grant of certiorari does not present any special or important reasons for this Court to exercise its discretion in granting his petition. There are no conflicting opinions within the federal judiciary system (appellate or otherwise) nor is this an important question of federal law which should consume this Court's time. The governing statute clearly sets forth the mandatory time frame in which plan administrators must discharge their duties to notify of a material modification and this duty was clearly met.

Respectfully submitted,

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APPENDIX

RULE 28.1 LISTING OF CORPORATE PARTY

Although petitioner has designated Mellon Bank, N.A. in the caption of his petition, Mellon Bank, N.A. was never served a copy of the summons and complaint and has never appeared in the case in the courts below. Therefore no appearance is made on behalf of Mellon Bank, N.A. and no Rule 28.1 listing is furnished.

The parent company, subsidiaries and affiliates of Armco Inc. are:

Acerex; Acerco S.A.; Aceros Comerciales Peru S.A.; Aceros Del Orlente S.A.; Aceros Del Sur S.A.; AH (UK) INC.; AIGI Leasing, Inc.; Armco AB; Armco ApS; Armco Advanced Materials Corporation; Armco Argentina S.A.; Armco Canada Ltd.; Armco Caribbean Corporation; Armco Chile S.A. Sociedad Anonima; Armco Colombiana S.A.; Armco Colombo; Armco Dinslaken GmbH; Armco D.O.; Armco Equipetrol S.A.; Armco Finance (UK) Ltd.; Armco Financial Holdings Corporation; Armco Financial Services Corporation; Armco Financial Services Europe Limited; Armco Financial Services, Inc.; Armco Financial Services International, Inc.; Armco Financial Services International, Ltd.; Armco Flexal B.V.; Armco GmvH; Armco Grinding Systems; Armco Industrial S.A.; Armco Industries (Nigeria) Ltd.; Armco Instapanel S.A.; Armco Insurance Group Inc.; Armco International, Inc.; Armco International Insurance Company of Bermuda; Armco Investment Management, Inc.; Armco Limited; Armco Management Corporation; Armco Marsteel Alloy Corporation; Armco Merchan-

dising Limited; Armco Merchandising S.A.; Armco Moly-Cop S.p.A.; Armco National Re Incorporated; Armco National Supply (Australia) Pty. Ltd.; EXIM Overseas; Armco Overseas Manufacturing Corporation; Armco Pacific Financial Corporation; Armco Pacific Financial Services Limited; Armco Pacific Investments, Inc.; Armco Pacific Limited; Armcopaxi S.A.; Armco Peruana S.A.; Armco Realty Corporation; Armco Resources Pty. Ltd.; Armco S.A.; Armco S.A. (Spain) Spanish; Armco SARL; Armco SDT Limited; Armco Services S.A.M.; Armco Shipping Limited; Armco (South Africa) (Proprietary) Limited; Armco Steel Corporation; Armco Steel Processing Company; Armco Syndicate Ltd.; Armco Trust Limited; Armco Underwriters Agency, Inc.; Armco Uruguaya S.A.; Armco Venezolana S.A.; Armco Wire Company; Artex Constructors, Inc.; Atlantic National Insurance Company, Ltd.; Australian Steel & Mining Corporation Pty. Ltd.; Autometrics Co.; P.T. Bakrie-Armco; Baltimore Speciality Steels Corporation; Bellefonte Underwriters Insurance Company; Black River Lime Company; B.N.L.M.S. Limited; BN Underwriting Management Limited; British National Insurance Company of Bermuda Ltd.; Bundy Venezolana C.A.; C.A. Armco Venezolana; C.A. Tubos Armco; Armco Colombo S.P.A.; Compass Insurance Company; Continental Western Industries, Inc.; Control International, Inc., The Cumberland Group, Inc.; D.I.F.S.-I.C.A.; ENCORP INC.; Everest International, Inc.; EXIM Overseas Inc.; Falconbridge Dominicana C.porA.; First Taconite Company; Charles Fulton (Asia) Holdings Ltd.; Charles Fulton (Australia) Pty. Ltd.; Charles Fulton (Malaysia) Sendirian Berhad; Charles Fulton (Singapore) Holdings Ltd.; Charles Fulton (Singapore) 1982 Ltd.; Hangar Facilities, Inc.; In-

dustrias National Supply C.A.; Inmobillara Hierro y Accro, S.A.; Insurance Management Corporation; Inversiones Armco C.A.; Metaltubos C.A.; MINARMCO S.A.; National Supply Company, Inc.; The National Supply Company of Mexico, S.A.; National Supply France S.A.R.L.; National Supply Stores Pte. Ltd.; NN Administration, Inc.; NN Risk Management Services, Inc.; North Atlantic Management Company Limited; Northern Automatic Electric Foundry, Inc.; Northern Land Company; Northwestern National Casualty Company; Northwestern National Insurance Company; Obras Civiles e Industrias C.A.; Pacific Automobile Insurance; Pacific National Insurance Company; Productos Metalicos Armco S.A.; Prolansa; Reserve Mining Company; Strata Energy, Inc.; Talbico, Inc.; Tercad Limited; United Lubricants Corporation; Universal Reinsurance Corporation; Virginia Horn Taconite Company; Westchester Nominees Ltd.; Winning Post Investment Ltd.; ME International (with Stelco Inc. and Armco Inc.); National-Oilwell (Armco Inc. and U.S.X.)

Armco Inc. Benefit Plans Administrative Committee is an unincorporated committee appointed by Armco.

STATUTES AND REGULATIONS

1. 29 U.S.C. § 1024(b)(1):

(b) *Publication of summary plan description and annual report to participants and beneficiaries of plan*

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary), within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section

1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

2. 29 U.S.C. § 1104(a)(1)(A) and (B):

(a) *Prudent man standard of care*

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

3. 29 C.F.R. § 2520.104b-1(b):

(b) *Fulfilling the disclosure obligation.* (1) Where certain material, including reports, statements and documents, is required under Part 1 of the Act and this part to be furnished either by direct operation of law

or on individual request, the plan administrator shall use measures reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. Material which is required to be furnished to all participants covered under the plan and beneficiaries receiving benefits under the plan (other than beneficiaries under a welfare plan) must be sent by a method or methods of delivery likely to result in full distribution. For example in-hand delivery to an employee at his or her worksite is acceptable. However, in no case is it acceptable merely to place copies of the material in a location frequented by participants. It is also acceptable to furnish such material as a special insert, in a periodical distributed to employees such as a union newspaper or a company publication if the distribution list for the periodical is comprehensive and up-to-date and a prominent notice on the front page of the periodical advises readers that the issue contains an insert with important information about rights under the plan and the Act which should be read and retained for future reference. If some participants and beneficiaries are not on the mailing list, a periodical must be used in conjunction with other methods of distribution such that the methods taken together are reasonably calculated to ensure actual receipt. Material distributed through the mail may be sent by first, second, or third-class mail. However, distribution by second or third-class mail is acceptable only if return and forwarding postage is guaranteed and address correction is requested. Any material sent by second or third-class mail which is returned with an address correction shall be sent again by first-class mail or personally delivered to the participant at his or her worksite.

4. 29 C.F.R. § 2520.104b-3(b):

> (b) The summary of material modifications to the plan or changes in information required to be included in the summary plan description need not be furnished separately if the changes or modifications are described in a timely summary plan description. For example, a calendar year plan adopts a material modification on June 3, 1976. The modification is incorporated in a summary plan description furnished on July 15, 1977. No separate summary of the material modification is furnished. The plan adopts another material modification September 15, 1977. A separate summary of the modification is furnished on or before July 29, 1978.